85-917

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARGIE P. HOLLINS, ANNETTE MCNEIL, LLOYD BROWN and MAMIE WALLACE,

Petitioners,

vs.

ROBERT LEE POWELL and THE CITY OF WELLSTON, MISSOURI,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED FOR REVIEW

I

Did The Appellate Court Unconstitutionally And In Violation Of Established Rules and Legal Principles Order A Remittitur Of 86.7% Of Petitioners' Actual Damage Jury Award And Of 99.6% Of Petitioners' Punitive Damage Jury Award (Or In The Alternative Order A New Trial On The Issue Of Damages Only); When The District Court Had Overruled Respondents' Motion For New Trial Based Upon A Claim That The Jury Damage Awards Were Excessive; When The Appellate Court Had Not Found The District Court's Denial Of A New Trial To Respondents To Be Clearly Erroneous; And When The Appellate Court Substituted Its Own Concept Of "Adequate" And Sufficient Damage Awards On Remittitur In Lieu Of The Jury's Damage Awards?

II

In Violation Of The Seventh Amendment Of The United States Constitution And In A Manner Inconsistent With Prior Rulings Of This Honorable Court And Of Other Appellate Circuits Limiting Remittiturs To The Maximum Amount The Jury Could Have Lawfully Awarded, Did The Appellate Court Substitute Its Own Concept Of "Adequate" And Sufficient Damage Awards On Remittitur In Lieu Of The Jury's Damage Awards?

III

Did The Use of Remittitur By The Appellate Court Violate The Seventh Amendment Of The United States Constitution?

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REFERENCE TO REPORTED OPINION

The Opinion of the Eighth Circuit in this cause is not reported at this time, but is contained in the attached Appendix at A-1 - A-12.

STATEMENT OF JURISDICTION

The judgment by the Eighth Circuit sought to be reviewed was filed on September 11, 1985. Petitioners sought rehearing before the Eighth Circuit on September 25, 1985, and rehearing was denied by the Eighth Circuit on October 14, 1985. Jurisdiction to review said judgment is conferred upon This Honorable Court by 28 U.S.C. §2101(c) and by Supreme Court Rule 20.2.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

Seventh Amendment of the United States Constitution.

> Findings of fact, whether based on oral or documentary evidence shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Federal Rule of Civil Procedure No. 52(a) (in pertinent part).

STATEMENT OF THE CASE

This suit was brought by Petitioners (the four Commissioners of municipal Respondent's (the city of Wellston) Housing Authority and of municipal Respondent's Land Clearance and Redevelopment Authority), alleging a violation of federal rights under 42 U.S.C. §1983 and a violation of the tort of unlawful arrest under Missouri state law, by reason of their arrests on December 8, 1982, pursuant to the direction and policy of Respondent City and Respondent Robert Lee Powell (Respondent City's Mayor).

A jury trial began on March 26, 1984, and ended on March 28, 1984, when the jury returned its verdict, and the District Court entered judgment in favor of all Petitioners in the amount of $300,000 as actual damages, jointly and severally against both Respondents and $500,000 as punitive damages against Respondent Powell, finding them liable under both the §1983 claim and the pendent state claim of unlawful arrest. A summation with transcript references of testimony supporting the damage awards is contained in the attached Appendix at A-13 - A-25.

Motions by both Respondents for judgment notwithstanding the verdict or for a new trial (A-26 - A-30) and to alter or to amend the judgment (A-31- A-32), based in part upon the alleged excessiveness of the verdicts, were filed on April 5, 1984, and were denied by the District Court on June 1, 1984 (A-33- A-34).

Respondents filed their joint Notice of Appeal on June 22, 1984, and on September 11, 1985, the Appellate Court affirmed the liability of Respondents, but ordered a remittitur of 86.7% of Petitioners' actual damage award and 99.6% of Petitioners' punitive damage award (or granting to Petitioners in the alternative a new trial on the damages issue alone) (A-1 - A-12).

Respondents filed a request for rehearing before the Appellate Court on September 25, 1985 (A-35 - A-44), and the same was denied on October 14, 1985 (A-45).

Respondents requested a stay of judgment from the Appellate Court on November 1, 1985, pursuant to Supreme Court Rule No. 44.2 and 28 U.S.C. §2101(f), and the same was granted on November 15, 1985.

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

Jurisdiction in the federal court was founded upon 28 U.S.C. §§1331 and 1343(a)(3) and upon 42 U.S.C. §1983.

ARGUMENT

The judgment of the Appellate Court is in direct conflict with decisions of this Honorable Court and of other Appellate Courts as to the standard to be applied in ordering a remittitur of damages and as to the ordering of a remittitur without finding that the District Court's refusal to amend, vacate or remit the damages awarded by the jury was clearly erroneous.

Further, the judgment of the Appellate Court squarely presents the issue, currently unresolved by this Honorable Court, as to the constitutionality of a remittitur in light of the Seventh Amendment of the United States Constitution.

I

The Appellate Court Unconstitutionally And In Violation Of Established Rules And Legal Principles Ordered A Remittitur Of 86.7% Of Petitioners' Actual Damage Jury Award And Of 99.6% Of Petitioners' Punitive Damage Jury Award (Or In The Alternative Ordered A New Trial On The Issue Of Damages Only); When The District Court Had Overruled Respondents' Motion For New Trial Based Upon A Claim That The Jury Damage Awards Were Excessive, When The Appellate Court Had Not Found The District Court's Denial Of A New Trial To Respondents To Be Clearly Erroneous, And When The Appellate Court Substituted Its Own Concept Of "Adequate" And Sufficient Damage Awards On Remittitur In Lieu Of The Jury's Damage Awards.

A clear and fair reading of the Appellate Court's decision reflects its undue concern for, consideration of and reliance upon Respondents' financial status, matters totally *de hors* the record. E.g.: "[A] black mayor of limited resources," "a black community," "unlikely that the City will recover much of this award from Powell," "he appears to be under severe financial constraints," "a verdict which cannot possibly be satisfied" (A-10 - A-12). The Appellate Court's unwarranted deference to

the "assumed" economic plight of the Respondents is impermissible and unsubstantiated in the record.

There exists in the entire record not a scintilla of evidence as to the financial condition of either Respondent. Only post-trial news media reports and Respondents' own self-serving statements during appellate oral argument would even suggest such circumstances. Petitioners strenuously maintain that Respondents are quite capable of paying the awards determined by the jury. Nevertheless, even assuming the present truth of the Appellate Court's assumptions (again based solely upon matters outside of the record), such matters were totally inappropriate for the Appellate Court's consideration of compensatory damages.

> As a general rule, it is error to admit evidence of a party's financial condition unless necessary to determine the damages sustained. *Blankenship v. Rowntree,* 219 F.2d 597, 598 (10th Cir. 1955).. . . Additionally, this inadmissible evidence includes that of the *poverty* of a party. 22 Am.Jur.2d *Damages* §319 (1965).

Whiteley v. OKC Corp., 719 F.2d 1051, 1055 (10th Cir. 1983). *See: Firestone v. Crown Center Redevelopment Corp.*, 693 S.W.2d 99, 110 (Mo. banc 1985).

The Appellate Court appeared to question the quantity of the evidence in noting that "[o]nly one [Petitioner] offered evidence to corroborate her testimony regarding employment difficulties [and] [n]either of the [Petitioners] suffering medical difficulties offered medical evidence in support of their claims" (A-10). Since it is clear that the Appellate Court deemed there to be sufficient evidence for a verdict on liability and for a substantial damage award in favor of Petitioners, it is difficult to appreciate this observation, inasmuch as once the minimum threshhold has been passed, the quantity of evidence is not legally related to the amounts of injury suffered or of damages deserved as compensation.

The Appellate Court also relied upon, in part, its observation "that the [Petitioners] received an award of attorneys' fees and costs and thus do not need to rely on either damage award to pay for their attorney's services" (A-12). Again, the record is devoid of any understanding or agreement between Petitioners and their counsel as to either the amount or source of fees and costs incurred. Nor is such understanding or agreement a relevant factor in the determination of either compensatory or punitive damages.

> [T]he basic purpose of a §1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights. . . .
>
> . . . .
>
> 'The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty' . . . [and] [t]he Court implicitly has recognized the applicability of this principle to actions under §1983. . .

Carey v. Piphus, 435 U.S. 247, 254-55 (1978). It is 42 U.S.C. §1988 which addresses itself independently to an award of fees to a prevailing §1983 party.

The Appellate Court made no finding whatever that the District Court's determination of the damage awards being supported by the evidence was clearly erroneous.

Initially, Petitioners strongly disagree that the compensatory award of $75,000 per person and the punitive award of $125,000 per person are "plain injustice" and "shocking" (A-10). Both the jury and the District Court, having heard the evidence firsthand, concluded that the amounts awarded were appropriate. While the Appellate Court's decision is silent on this point, it is manifest that the Appellate Court disagreed with the District Court's finding that the damages were not grossly excessive. This "Monday morning quarterbacking" of the jury

and the District Court judge by the Appellate Court, which did not even see the game being played, is highly suspect. Regardless, it is manifest that the amounts of compensatory and punitive damages assessed by the Appellate Court constitute nothing less than a total substitution of its judgment for that of both the jury and the District Court.

The Appellate Court characterized its $10,000 compensatory finding per Petitioner as "adequate compensation for the injuries . . . suffered" and the $500 punitive finding per Petitioner as sufficient to "serve the purpose of punishing" and to "satisfy the deterrent purpose" (A-11 - A-12). Based solely upon *pro se* statements by Respondent Powell during appellate argument, the Appellate Court concluded: "he appears to be under severe financial constraints. We can see neither the justice nor sense in affirming a verdict which cannot possibly be satisfied." (A-12). These independent determinations and findings of appropriate awards of damages have absolutely and totally denied to Petitioners their unconditional rights to a jury trial under the Seventh Amendment to the United States Constitution, particularly where the Appellate Court has been influenced by matters completely outside of the record and which were neither before nor within the consideration of the jury or of the District Court. By considering this extraneous information as to the alleged financial status of the Respondents, the Appellate Court has clearly abused its discretion.

This Honorable Court has consistently looked askance at findings by the Appellate Courts that jury damage awards are grossly excessive and has most frequently reversed remittiturs ordered by the Appellate Courts. *See: Grunenthal v. Long Island Railroad Company,* 393 U.S. 156 (1968); *Neese v. Southern Railway Company,* 350 U.S. 77 (1955); and *Snyder v. United States,* 350 U.S. 906 (1955). *Snyder, supra,* was reversed outright without opinion. The Appellate Court in *Snyder* had erroneously ordered a one-third reduction of the District Court damage awards. In *Neese,* this Honorable Court in an unanimous *per curiam* opinion stated:

> [W]e find that the Court of Appeals was not justified, on this record, in regarding the denial of a new trial, upon a remittitur of part of the verdict, as an abuse of discretion . . . as we view the evidence we think that the action of the trial court was not without support in the record, and accordingly that its action should not have been disturbed by the Court of Appeals.

350 U.S. at 77.

Similarly, in *Grunenthal,* a case identical to this case in its procedural history, this Honorable Court held:

> [T]he action of the trial judge [in refusing to set aside the jury damage award as excessive], as we view the evidence, should not have been disturbed.

393 U.S. at 158.

In *United States v. Johnson,* 327 U.S. 106 (1946), this Honorable Court held:

> While the appellate court might intervene when the findings of fact are wholly unsupported by evidence . . . it should never do so where it does not clearly appear that the findings are not supported by *any* evidence.

327 U.S. at 111-12. (Emphasis supplied).

The transcript references to the testimony and evidence sustaining the damage award to each Petitioner are included in the Appendix (A-13 - A-25). It is inconceivable that the Appellate Court, while failing to find that the damage awards were the result of any passion or prejudice, could nevertheless reduce the actual and punitive damages by 86.7% and 99.6%, respectively. Petitioners are unaware of any reported decision where remittiturs of this degree have been ordered, much less sustained.

It is also noteworthy that all of Respondents' post-trial motions (A-26- A-32) objected to excessiveness of the verdicts sole-

ly on the grounds of jury "passion and prejudice" (A-28, A-31), grounds rejected by the Appellate Court, as evidenced by its use of remittitur rather than the direction of new trial. A new trial is mandated when jury passion and/or prejudice is determined. *Minneapolis, St. Paul & Sault Ste. Marie Railway Company v. Moquin,* 283 U.S. 520, 521-22 (1931). Since "passion and prejudice" were the only grounds submitted by Respondents in support of their claim of verdict excessiveness, as contained in their post-trial motions to the District Court, the Appellate Court exceeded its authority in ordering a remittitur on grounds other than those of passion or prejudice.

The District Court denied Respondents' motion for judgment notwithstanding the verdict on the grounds asserted by Respondents.

> [W]hether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart.

Cone v. West Virginia Pulp & Paper Company, 330 U.S. 212, 216 (1947). The Appellate Court did not and could not have determined that the District Court's ruling on the post-trial motion was clearly erroneous, because the Appellate Court proceeded on a theory of verdict excessiveness, which was neither raised by the Respondents nor presented to the District Court for its review.

II

In Violation Of The Seventh Amendment Of The United States Constitution And In A Manner Inconsistent With Prior Rulings Of This Honorable Court And Of Other Appellate Circuits Limiting Remittiturs To The Maximum Amount The Jury Could Have Lawfully Awarded, The Appellate Court Substituted Its Own Concept Of "Adequate" And Sufficient Damage Awards On Remittitur In Lieu Of The Jury's Damage Awards.

Undoubtedly, the Appellate Court has applied the incorrect standard in reducing the damage awards.

> [W]e agree with Gorsalitz's over-all attack that the court committed an error of law in failing to apply *the proper test of excessiveness, which we hold was the maximum which the jury could reasonably find.* We agree with the view expressed in 3 Barron & Holtzoff, Federal Practice & Procedure (Wright ed.) §1305.1, p.376:
>
> > 'There are some differences of opinion as to the standard by which the court should be guided in determining the amount of remittitur. One theory is that an excessive verdict should be reduced to the minimum amount which the jury might have awarded, since award of any greater sum deprives the defendant of his right to a jury trial. Other courts have felt free to reduce the verdict, by remittitur, to that amount which the court itself considers the jury should have allowed. A final theory is that the jury by its excessive verdict intended to award the maximum and defendant cannot complain of any judgment within the permissible limits. *This theory permits reduction only to the highest amount which the jury could properly have awarded. It is the only theory which has any reasonable claim of being con-*

> *sistent with the Seventh Amendment.'* [Footnotes omitted.]
>
> . . . .
>
> In the present case the district court clearly substituted its view of a reasonable amount to award the plaintiff for the verdict of the jury. The forceful language of Mr. Justice Sutherland employed in another context in Dimick v. Schiedt, *supra,* aptly describes the result of an affirmance of the amount of remittitur required by the district court:
>
> > 'To so hold is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury and accept "an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess." '

Gorsalitz v. Olin Mathieson Chemical Corporation, 429 F.2d 1033, 1046-47 (5th Cir. 1970), *cert. denied,* 407 U.S. 921 (1972). (Emphasis supplied). This standard remains the law in the Fifth Circuit (*Maxey v. Freightliner Corporation,* 722 F.2d 1238, 1242 (5th Cir. 1984) and *Smith v. Shell Oil Company,* 746 F.2d 1087, 1096 (5th Cir. 1985)), as well as in other Circuits. *See: Boyle v. Bond,* 187 F.2d 362, 363 (D.C.C. 1951); *Reinertsen v. George W. Rogers Construction Company,* 519 F.2d 531, 532 (2nd Cir. 1975); *Katch v. Speidel, Division of Textron, Inc.,* 746 F.2d 1136, 1144 (6th Cir. 1984); *Covey Gas & Oil Co. v. Checketts,* 187 F.2d 561, 563 (9th Cir. 1951); *Jackson v. Magnolia Brokerage Company,* 742 F.2d 1305, 1306-07 (11th Cir. 1984). The Eighth Circuit on different occasions has also adopted the standard of remittitur as "the maximum limit justifiable under the evidence." *Slatton v. Martin K. Eby Construction Co., Inc.,* 506 F.2d 505, 508-09 (8th Cir. 1974). Similarly, in reducing an award of punitive damages, the Eighth Circuit had previously referred to this standard as "the outer range" permissible. *Northern v. McGraw-Edison Company,* 542 F.2d 1336, 1350 (8th Cir. 1976), *cert. denied,* 429 U.S. 1097 (1977).

Historically, this Honorable Court has adopted this same principle.

> In requiring the remission of what was deemed excessive it did nothing more than require the relinquishment of *so much of the damages as,* in its opinion, *the jury had improperly awarded.* The corrected verdict could therefore, be properly allowed to stand.

Northern Pacific Railroad Company v. Herbert, 116 U.S. 642, 646 (1886). (Emphasis supplied).

> [A]ny seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.
>
> . . . .
>
> Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the veiw that what remains is included in the verdict along with *the unlawful excess* — in that sense that it has been found by the jury —. . .

Dimick v. Schiedt, 293 U.S. 474, 486 (1935). (Emphasis supplied).

The Appellate Court's unbridled substitution of actual and punitive damage awards it deemed in its own words as "adequate," and sufficient to "serve the purpose of punishing" and to "satisfy the deterent purpose" has destroyed the basic Seventh Amendment right of jury trial to Petitioners.

III

The Use Of Remittitur By The Appellate Court Violated The Seventh Amendment Of The United States Constitution.

Although the use of remittitur has been historically widespread within the circuits and has received tacit acceptance by this Honorable Court, it has not been condoned without judicial reservations.

Since the decision of Mr. Justice Story in 1822 [*Blunt v. Little*, (C.C.) 3 Mason, 102, Fed.Cas.No. 1578], this court has never expressed doubt in respect of the rule, and it has been uniformly applied by the lower federal courts. It is, however, remarkable that in none of these cases was there any real attempt to ascertain the common law rule on the subject. Mr. Justice Story, in the *Blunt* case, cited two English cases antedating the Constitution in support simply of his conclusion that the court had power to grant a new trial for excessive damages, and thereupon announced without more that unless the plaintiff should be willing to remit $500 of his damages, the cause would be submitted to another jury. For the latter conclusion, no authority whatever was cited. The plaintiff remitted the amount, and the motion was overruled. The opinion in the *Herbert* case was delivered by Mr. Justice Field. Upon the question now under consideration, the opinion does no more than declare that the exaction, as a condition of refusing a new trial, that plaintiff should remit a portion of the amount awarded by the verdict, was a matter within the discretion of the court, in support of which two American state cases and the *Blunt* case are cited. The common law in respect of the matter is not referred to. The state cases cited are equally silent in respect of the common law rule.

The nearest approach to a reasoned opinion on the subject in any of the decisions is found in *Arkansas Cattle Co. v. Mann, supra*. In that opinion, the court states the contention to be that to make the decision of the motion for new trial depend upon a remission of part of the verdict is in effect a reexamination by the court in a mode not known at the common law of facts tried by the jury, and therefore a violation of the Seventh Amendment. The court decided against this contention upon the authority of the *Blunt* case, the *Herbert* case, and certain American state decisions. English cases were referred to only upon the point

that the court had authority to set aside the verdict and grant a new trial where the damages are palpably or outrageously excessive. No attempt was made to seek the common law rule, in respect of the precise contention which was made, by an examination of the English decisions or of the English practice prior to the adoption of the Constitution.

In the last analysis, the sole support for the decisions of this court and that of Mr. Justice Story, so far as they are pertinent to cases like that now in hand, must rest upon the practice of some of the English judges—a practice which has been condemned as opposed to the principles of the common law by every *reasoned* English decision, both before and after the adoption of the Federal Constitution, which we have been able to find.

In the light reflected by the foregoing review of the English decisions and commentators, it, therefore, may be that if the question of remittitur were now before us for the first time, it would be decided otherwise.

Dimick v. Schiedt, 293 U.S. 474, 483-84 (1935).

In recent cases, this Honorable Court has reversed the Appellate Courts' ordering of remittitur while sidestepping any direct confrontation between the use of remittitur and the Seventh Amendment.

We reverse the judgment of the Court of Appeals without reaching the constitutional challenge to that court's jurisdiction to review the denial by the trial court of a motion for a new trial on the ground that the verdict was excessive.

Neese v. Southern Railway Company, 350 U.S. 77 (1955).

Petitioner argues that the Court of Appeals exceeded its appellate powers in reviewing the denial of the railroad's

> motion, either because such review is constitutionally precluded by the provision of the Seventh Amendment that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law,' or because such review is prohibited by the Federal Employers' Liability Act itself. We have no occasion in this case to consider that argument, for assuming, without deciding, that the Court of Appeals was empowered to review the denial and invoked the correct standard of review, the action of the trial judge, as we view the evidence, should not have been disturbed.

Grunenthal v. Long Island Railroad Company, 393 U.S. 156, 157-58 (1968). The Appellate Court did not find the damage award to be the result of passion or prejudice, which would require a new trial and not permit an order of remittitur. *Minneapolis, St. Paul & Sault Ste. Marie Railway Company v. Moquin*, 283 U.S. 520, 521-22 (1931).

The use of remittitur by the Appellate Court is contrary to the rule against appellate intervention "where it does not clearly appear that the findings are not supported by *any* evidence." *United States v. Johnson*, 327 U.S. 106, 112 (1946). (Emphasis supplied). Further, the use of remittitur in this instance and in the manner applied ignores and does injustice to the recent holding in *Anderson v. City of Bessemer, North Carolina*, ___ U.S. ___ (1985), 84 L.Ed.2d 518 and to the mandate of Federal Rule of Civil Procedure No. 52(a).

> [T]he ... Circuit improperly conducted what amounted to a *de novo* weighing of the evidence in the record.
>
> . . . .
>
> When the record is examined in the light of the appropriate deferential standard, it is apparent that it contains nothing that mandates a finding that the District Court's conclusion was clearly erroneous.

Anderson, 84 L.Ed.2d at 530. Mr. Justice Rehnquist's historical perspective on the Seventh Amendment in his dissent in *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322, 338-46 (1979) is illuminating on this issue. The apparent and significant conflict between the Appellate Court's use of remittitur under these circumstances and the Seventh Amendment should be clarified and resolved.

The Appellate Court below ignored the sound dictates of its own prior decision in *Vanskike v. Union Pacific Railroad Company*, 725 F.2d 1146 (8th Cir. 1984).

> Assessment of damages is within the sound discretion of the jury. Each case is evaluated by a different, randomly selected group of individual jurors.
>
> > (W)e must expect substantial disparities among juries as to what constitutes adequate compensation for certain types of pain and suffering. This is a litigious fact of life of which counsel, clients and insurance carriers are fully aware. Once they place their fate in the hands of a jury, then they should be prepared for the result. . . . They cannot expect the Court to extricate them in all cases where the award is higher or lower than hoped for or anticipated. *Taken Alive v. Litzau*, 551 F.2d 196 (8th Cir. 1977), *quoting Mainelli v. Haberstroh*, 237 F.Supp. 190, 194 (M.D.Pa. 1964), *aff'd* 344 F.2d 965 (3rd Cir. 1965).
>
> . . . .
>
> An appellate court should be extremely hesitant to overturn a verdict which includes damages for pain and suffering.

Vanskike, 725 F.2d at 1150. The total inability of an Appellate Court fully to grasp and to appreciate the tenor and context of the courtroom presented testimony and evidence, by its subsequent review of the cold transcript, can not be lightly ignored.

WHEREFORE, for the reasons, law, equity and other considerations herein presented, Petitioners pray this Honorable Court to grant their Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1806

Margie P. Hollins, et al.,
Appellants,

v.

Robert Lee Powell, et al.,
Appellees.

Appeal from the United States
District Court for the
Eastern District of Missouri.

Submitted: June 13, 1985

Filed: September 11, 1985

Before HEANEY, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and BOWMAN, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

The defendants, the City of Wellston and Robert Powell, appeal from a judgment entered by the district judge[1] upon a jury

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[1] The Honorable Stephen N. Limbaugh, United States District Court for the Eastern District of Missouri.

verdict finding them liable for violating the plaintiffs' - Margie Hollins', Mamie Wallace's, Annette McNeil's and Lloyd Brown's - constitutional rights. We affirm the liability verdict, but remand this case to the district court with orders to remit the compensatory damage award to $40,000.00, and to remit the punitive damage award against Powell to $2,000. If the plaintiffs decline to accept the remittitur, they may have a new trial on the issue of damages.

I. FACTS

The plaintiffs all were commissioners on the Land Clearance Authority and Housing Authority (LCRA/HA) for the City of Wellston (City). They were appointed to these volunteer posts by Powell's predecessor in the mayor's office. Powell was elected mayor of the City on November 17, 1982. Pursuant to Missouri law, the mayor of a city has the sole authority to appoint individuals to serve on a commission created by a city council. *Mo. Rev. Stat.* § 99.050(1978). After assuming office, Powell began to question the legality of the plaintiffs' appointments to the LCRA/HA. Under Missouri law, a certificate of appointment is to be filed with the city clerk after a commissioner has been appointed by a mayor. *Mo. Rev. Stat.* § 99.380 (1978). Apparently, Powell was unable to locate the plaintiffs' certiciate of appointment. He appointed his own commissioners to the LCRA/HA.

On December 8, 1982, the plaintiffs arrived at City Hall for a regularly scheduled meeting of the LCRA/HA. The LCRA/HA had rented a room on the second floor of the building, directly across from the Mayor's office. Shortly after the meeting was called to order, Powell interrupted the meeting. He asked the plaintiffs if they had received a letter from him which had questioned the legality of their appointments. The plaintiffs replied that they had, and that they were propared to show him their letters of appointment. Powell, not wanting to see the letters, asked the plaintiffs to adjourn the meeting and to

refrain from meeting until it was determined that their appointments were legal. The plaintiffs refused, reminding Powell that they had the right to occupy the room the LCRA/HA had rented and that there was a legal procedure for removing commissioners from office. *See Mo. Rev. Stat.* § 99.070 (1978).

At some point, Powell left the room and called the police. The LCRA/HA's attorney and executive director also appeared at the meeting at some point. The police arrived and, after conferring briefly with Powell, asked the plaintiffs to adjourn the meeting. Upon advice of counsel, the plaintiffs refused. The police then arrested the plaintiffs, under charges of "unlawful assembly" and "failure to obey the command of a police officer," and took them to the police station. The plaintiffs were detained at the station between one - four hours, and were released on personal recognizance without charges being filed. Upon leaving the station, the plaintiffs were photographed by a member of the press. The story was given coverage by local and state media.

The plaintiffs filed a suit in federal district court against Powell, apparently in both his individual and official capacities, and against the City, claiming a violation of their consitutional rights in contravention of 42 U.S.C. § 1983 (1982).[2] At trial, each of the plaintiffs testified to having suffered embarrassment and public humiliation as a result of the incident. All the plaintiffs now have an arrest record, and none had one before the arrest in this case. One plaintiff testified to losing her job as a result of the incident, and another plaintiff testified to having

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[2] 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * *.

had difficulty obtaining a job because of the arrest. Two of the plaintiffs testified to experiencing an aggravation of existing medical problems as a result of the incident.

The jury returned a verdict for the plaintiffs, awarding them $300,000.00 against the City and Powell in compensatory damages, and awarding them $500,000.00 against Powell in punitive damages. On June 1, 1984, the district court awarded the plaintiffs $33,319.50 in attorney's fees and $1,712.55 in costs.

II. DISCUSSION

The City argues, first, that the district court erred in denying its motion for a new trial because the plaintiffs did not produce sufficient evidence to prove that Powell's acts constituted those of the City. We note that the City presented the defense for both Powell and itself in the district court. There is no evidence on the record to indicate that the City tendered, as part of its defense, evidence that Powell was acting solely in his individual capacity and not as Mayor of the City. It is only on appeal that the City has divorced itself from Powell.

As a threshold matter, we note that the City failed to move for a directed verdict at the close of all the evidence. As a result, our review of the district court's denial of the City's motion for a new trial is strictly limited. A party's failure to move for a directed verdict at the close of all the evidence precludes appellate review of the sufficiency of the evidence except for plain error. *Ferren v. Richards Mfg. Co.*, 733 F.2d 526, 528 (8th Cir. 1984); *Krueger v. State Farm Mut. Auto Ins. Co.*, 707 F.2d 312, 313-14 (8th Cir. 1983); *Myers v. Norfolk Livestock Mkt., Inc.*, 696 F.2d 555, 559 (8th Cir. 1982); *Harris v. Zurich Ins. Co.*, 527 F.2d 528, 529-30, 530 n. 1 (8th Cir. 1975); *Lange v. Schultz*, 627 F.2d 122, 128 (8th Cir. 1980). However, the City appealed from the denial of the post-trial motion and designated the sufficiency of the evidence as an issue for appeal. As a result, we may determine whether the district court abused its discretion in denying the motion and whether, as a matter of law, the denial of

the motion was erroneous because there is an absolute absence of evidence to support the jury's verdict. *Krueger,* 707 F.2d at 314-15; *Lange,* 627 F.2d at 128, 128 n. 5; *Harris,* 527 F.2d at 529-30, 530 n. 1.

In *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978), the United States Supreme Court overruled *Monroe v. Pape,* 365 U.S. 167 (1961), and held that municipalities were no longer "wholly immune from suit under § 1983." *Monell,* 436 U.S. at 663. However, the Court also held that a municipality could not be held liable, under a theory of respondeat superior, simply because it employes a tortfeasor. *Id.* at 691. "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694.

Particularly when dealing with municipal officials, other than a municipality's formal decision-making body, courts have struggled with the issue of when an official's "edicts or acts may fairly be said to represent official policy * * *." *See, e.g., Williams v. Butler,* 746 F.2d 431, 434-39 (8th Cir. 1984), *vacated,* 762 F.2d 73 (8th Cir. 1985), (en banc) *aff'g by an equally divided court,* No. LR C 81 633, slip op. (E.D. Ark., Aug. 17, 1983) (unpublished); *Wilson v. Taylor,* 733 F.2d 1539, 1545-47 (11th Cir. 1984); *Bennett v. City of Slidell,* 728 F.2d 762, 765-69 (5th Cir. 1984) (en banc), *cert. denied,* ____ U.S. ____, 105 S.Ct. 3476, (1985); *Wellington v. Daniels,* 717 F.2d 932, 935-37 (4th Cir. 1983); *Rookard v. Health & Hosps. Corp.,* 710 F.2d 41, 45-46 (2d Cir. 1983); *McKinley v. City of Eloy,* 705 F.2d 1110, 1116-17 (9th Cir. 1983); *Black v. Stephens,* 662 F.2d 181, 191 (3d Cir. 1981), *cert. denied,* 455 U.S. 1008 (1982). However, when the mayor of a city acts pursuant to authority that can fairly be said to have been granted under the type of government that the city operates, the mayor's actions or edicts "may fairly be said to represent official policy," *Monell,* 436 U.S. at 694, and thus fall squarely within the perimeters drawn in *Monell.*

Accordingly, when a mayor pursuant to the authority of his office violates a citizen's constitutional rights, a municipality is liable for damages under § 1983. *Thomas v. Sams,* 734 F.2d 185, 192, 193 (5th Cir. 1984), *cert. denied,* ___ U.S. ___ S.Ct. ___, 53 U.S.L.W. 3879 (June 18, 1985); *Berdin v. Duggan,* 701 F.2d 909, 913-14 (11th Cir.), *cert. denied,* 104 S.Ct. 239 (1983). *See generally Owen v. City of Independence,* 445 U.S. 622 (1980). Further, a city's liability is not contingent upon repeated constitutional violations by the mayor or city council. *See generally id.*

The question of whether an isolated, unconstitutional violation will render a city liable under § 1983 goes to the question of imputing liability to the City for the acts of a lower level city employee or official. In *City of Olkahoma City v. Tuttle,* ___ U.S. ___, 105 S.Ct. 2427 (1985), the Supreme Court held that a city policy may not be inferred from the single unconstitutional act of a police officer. ___ U.S. at ___, 105 S.Ct. at 2436. To allow such an inference would be to allow a:

> § 1983 plaintiff to establish municipal liability without submitting proof of a single action taken by a municipal policymaker. The * * * origins of *Monell's* "policy or custom" requirement should make clear that, at the least, that requirement was intended to prevent the imposition of municipal liability under circumstances where no wrong could be ascribed to municipal decisionmakers.

Id. at 2435. Where a mayor pursuant to the authority of his office violates a citizen's constitutional rights, it is clear that a wrong may be ascribed to municipal decisionmakers, and a single, unconstitutional act - perpetrated within the scope of authority delegated to the office - will be sufficient to support § 1983 liability. *See id.* at 2440-41 (Brennan, J., concurring).

Nor do we think that a mayor and a city council must act together in committing a constitutional violation before a city will be held liable under § 1983. For purposes of liability, it is

sufficient if the city council or mayor acts alone - abusing the authority duly delegated to the office - to violate the constitutional rights of another. Further, it is only when a mayor or city council has abused the authority delegated to the relevant office that a city will be held liable.

It is clear that, by ordering their arrest, Powell violated the plaintiffs' constitutional rights; this was not merely an aberrant act of a high city official. The plaintiffs were required to establish, as part of their claim, that Powell had under the governmental structure of the City of Wellston the authority to order their arrest or "removal" from City Hall. They accomplished this task through Powell's testimony and the testimony of the arresting officers. The City did not dispute this element of the claim. Thus, the *only* evidence on the record regarding Powell's authority to order the police to remove the plaintiffs from City Hall was to the effect that he had that authority. As a result we are unable to say that the district court committed plain error or abused its discretion by denying the City's motion for a new trial, or that there was an absolute absence of evidence to support the jury's verdict.

The City argues next that the district court erred by overruling the City's objection to the testimony of the City's attorney. The district court based its decision on the fact that it had ruled previously that the defendants had waived the attorney-client privilege.

Before trial, the plaintiffs sought to depose the City's attorney. The City filed a motion to quash the deposition, with an alternative request for a protective order, and the plaintiffs filed a motion to compel the deposition. The district court granted the plaintiffs' motion, noting that it appeared the City and Powell would raise advice of counsel as a defense, and held that the attorney-client privilege would be waived under those circumstances. The district court based its observations on the pleadings and the plaintiffs' assertions. Because the defendants

had not yet raised advice of counsel as a defense, the court granted them seven days from entry of the order to inform the court whether the communications with the attorney would be part of the defense. The defendants failed to file a motion for reconsideration.

The City argues that because the district court erred by granting the motion to compel the deposition, it also erred in overruling the City's objection to the attorney's testimony at trial. We disagree. The district court properly granted the motion to compel and, although we do so for a different reason than did the district court, we hold that the defendants had waived the attorney-client privilege by the time the attorney was called as a witness.

Because the plaintiffs have sued the defendants for a violation of federal law, the federal law of privilege applies to this issue. *Fed. R. Evid.* 501. Initially, we note that the party who claims the benefit of the attorney-client privilege has the burden of establihsing the right to invoke its protection. *Diversified Indus., Inc. v. Meredith,* 572 F.2d 596, 609 (8th Cir. 1978) (en banc); *Bouschor v. United States,* 316 F.2d 451, 456 (8th Cir. 1963). The defendants clearly failed to meet this burden as far as the deposition of the attorney is concerned. They adduced no evidence to support their assertion of the privilege. Thus, the district court did not err by granting the plaintiffs' motion to compel the deposition.

During the attorney's deposition, the City objected whenever it perceived that a question covered by the privilege was asked, and then instructed the attorney to answer the question. The plaintiffs argue that by proceeding in this manner the defendants waived the privilege. Under the circumstances of this case, the defendants preserved their right to claim the privilege at trial as to those questions to which they had objected. Had the defendants interrupted the deposition every time it objected to a question on the basis of privilege, and sought a protective order from the district court, they would have been violating the

court's previous order. Thus, we reject the contention that the defendants waived the privilege during the deposition. Nontheless, we hold that the defendants did waive the privilege during trial.

A client may waive the attorney-client privilege, and may do so either expressly or by implication. *Sedco Int'l, S.A. v. Cory,* 683 F.2d 1201, 1206 (8th Cir.), *cert. denied,* 459 U.S. 1017 (1982); *Tasby v. United States,* 504 F.2d 332, 336 (8th Cir. 1974), *cert. denied,* 419 U.S. 1125 (1975); *Schwimmer v. United States,* 232 F.2d 855, 863 (8th Cir.), *cert. denied,* 352 U.S. 833 (1956). Waiver will be implied when a client has testified concerning portions of the attorney-client communication. *Sedco,* 683 F.2d at 1206; *Steen v. First Nat'l Bank of Sarcoxie,* 298 F. 36, 41 (8th Cir. 1924).

On plaintiffs' direct examination of him, Powell testified as to the substance of his conversations with the City's attorney, as well as to the substance of his conversations with his own attorney. This testimony occurred before the City's attorney was called as a witness. Because the City's attorney failed to object to the plaintiffs' relevant questions of Powell, it waived the attorney-client privilege. Thus, we need not determine whether the district court erred by relying on its pretrial order in overruling the City's objection to the attorney's testimony, for the privilege had been waived by that time.

Finally, the City and Powell argue that the $300,000.00 compensatory damage award is excessive, and Powell argues that the $500,000.00 punitive damage award is excessive. We agree.

The defendants preserved the excessiveness of the verdicts as an issue on appeal by presenting the issue to the district court in their motion for a new trial. *DeWitt v. Brown,* 669 F.2d 516, 524 (8th Cir. 1982). This court has noted repeatedly that the excessiveness of a verdict is basically an issue for the trial court, and that we consider review only in those rare situations where we are pressed to conclude that there is a plain injustice, or a

monstrous or shocking result. *Ferren*, 733 F.2d at 531; *Vanskike v. Union Pac. R.R.*, 725 F.2d 1146, 1149-50 (8th Cir. 1984) (quoting *Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 447-48 (8th Cir.), *cert. denied*, 368 U.S. 929 (1961)); *Taken Alive v. Litzau*, 551 F.2d 196, 198 (8th Cir. 1977) (quoting *Solomon*, 294 F.2d at 447-48). As the plaintiffs correctly note, when reviewing damage awards "each case must be evaluated as an individual one, within the framework of its distinctive facts." *Vanskike*, 725 F.2d at 1150. Given the facts in this case, we believe that an affirmance of the damage awards would result in plain injustice. The compensatory awards and the punitive award are shocking.

We are unable to accept the plaintiffs' argument that there is overwhelming evidence to support the compensatory award of $75,000.00 to each plaintiff. The plaintiffs were arrested and detained for one - four hours. Because of the incident, and for the first time, each of the plaintiffs has an arrest record. Each plaintiff testified to having suffered embarrassment and public humiliation as a result of their arrest. Two plaintiffs testified to having employment problems, and two plaintiffs testified to suffering medical difficulties as a result of the incident. Only one plaintiff offered evidence to corroborate her testimony regarding employment difficulties. Neither of the plaintiffs suffering medical difficulties offered medical evidence in support of their claims.

We are appalled always at the self-righteous arrogance which permits a government official to misuse the authority granted by his or her office. This case is no exception. Nevertheless, we are unable to justify an award of $75,000.00 in compensatory damages per plaintiff, and we order a remittitur to the amount of $10,000.00 per plaintiff for a total award of $40,000.00 in compensatory damages. By ordering this remittitur, we in no way demean or slight the injuries inflicted upon the plaintiffs by the City, acting through its Mayor. This was a foolish, ill considered act by a black mayor of limited resources (Powell was

paid nineteen thousand dollars annually for full time position as mayor and has since lost that post) in a black community whose innocent taxpayers must bear the pecuniary liability for this constitutional tort. We have read the relevant portions of the trial transcript - particularly the plaintiffs' testimonies - very carefully, and we believe that $10,000.00 is adequate compensation for the injuries they suffered.

We likewise order a remittitur of the punitive damage award returned against Powell. Punitive damages may be awarded in a § 1983 case against a defendant whose conduct has involved a reckless or callous indifference to the federally protected rights of others. *Smith v. Wade*, 461 U.S. 30, 56 (1983), *aff'g Wade v. Haynes*, 663 F.2d 778 (8th Cir. 1981); *Block v. R. H. Macy Co.*, 712 F.2d 1241, 1246 (8th Cir. 1983). *See also* Note, *Punitive Damages in Section 1983 Actions: The Eighth Circuit's Requirement of Malicious Intent*, 16 *Creighton L. Rev.* 898 (1983) (excellent discussion of the justification for awarding punitive damages in § 1983 actions and analysis of review of such awards in the Eighth Circuit). Punitive damages may be awarded to punish a defendant for outrageous conduct and to deter similar conduct in the future. *Smith*, 461 U.S. at 54 (quoting *Restatement (Second) of Torts* § 908(1) (1979)). "The focus is on the character of the tortfeasor's conduct - whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards." *Smith*, 461 U.S. at 54.

There is no question that Powell's behavior calls for an award of punitive damages. In addition, it appears as if the City and Powell bear joint and several liability for the compensatory damage award, and it is unlikely that the City will recover much of this award from Powell. Thus, it is the City which is bearing the brunt of the inexcusable act of its Mayor. Nevertheless, the amount of the punitive damages awarded must bear a reasonable relationship to the injury inflicted. *Anthan v. P.A.T.C.O.*, 672 F.2d 706, 712 (8th Cir. 1982) (quoting *Northern v. McGraw-Edison Co.*, 542 F.2d 1336, 1350 (8th Cir.

1976), *cert. denied,* 429 U.S. 1097 (1977)). Further, in assessing punitive damages, it is appropriate to consider the defendant's net worth. *Bankers Life & Casualty Co. v. Kirtley,* 307 F.2d 418, 425 (8th Cir. 1962); *Restatement (Second) of Torts,* § 908(2) comment e (1977).

Powell has lost his position as Mayor, and he appears to be under severe financial constraints. We can see neither the justice nor sense in affirming a verdict which cannot possibly be satisfied. The purpose of punitive damages is to punish Powell for outrageous conduct, not to drain him of his life's blood. We note also that the plaintiffs received an award of attorneys' fees and costs and thus do not need to rely on either damage award to pay for their attorney's services. The statement in *Bankers Life & Casualty Co.,* 307 F.2d at 425: "The record with respect to Banker's financial status is not such as to justify the extremely large award of exemplary damages" is certainly apropos to Powell's situation. We believe an award of $2,000 would serve the purpose of punishing Powell for his callous indifference to the plaintiffs' constitutional rights, and also satisfy the deterrent purpose of punitive damages, over and above that provided by the compensatory damage award.

Accordingly, we affirm the judgment and remand this case to the district court with orders to reduce the compensatory damage award to $40,000.00 and to reduce the punitive damage award to $2,000. If the plaintiffs will not accept a remittitur, they are free to retry the issue of damages before another jury. *Everett v. S. H. Parks & Assocs., Inc.,* 697 F.2d 250, 253 (8th Cir. 1983); *Restatement (Second) of Torts* § 908 comment d (1977).

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

Evidence As To Damages

Point II — The Substainability of the Compensatory Damages Awarded.

The custodian of records for the St. Louis County Police Department testified that all four Commissioners have arrest records dated "12/8/82," reflecting "two charges...[f]irst charge is suspect disobeying a police directive...[s]econd charge is suspect unlawful assembly...the records of these arrests were given a National Crime Information Center number" (T.2/35-36). "[T]hese arrest records are entered into computers nationwide...access [by]...[l]aw enforcement agencies, any sort of law enforcement agencies" (T.2/37-38). These arrest records are "in the Regis computer system...Regis is the worldwide computer system of all criminal incidents and charges" (T.2/84). "[T]his information is available to every computer in every police department throughout this land... [a]ny officer anytime...at any police station, precinct house, sheriff's office, constables office can...find out that these people have been arrested" (T.2/232-33).

Defendant Steven Haynes, Captain in the City's Police Department, stated that he was present at the incident on December 8, 1982, and that he did not "see anything there that day in regard to these four individuals [Commissioners] that... [he] felt in any way they were guilty of that crime" of unlawful assembly (T.2/78). City's police officer Matthews testified that neither of the charges levied were accurate or true (T.2/212-14) and that warrants were refused on both. (T.2/219).

Commissioners Margie P. Hollins had been a resident of the City for "ten years" (T.1/30), but moved from the City after the incident. The "events of December the 8th 1982, were...a factor in the move" (T.1/31). She testified:

> I lost one job I felt very deeply about because of the problems I had in the city and because of my visibility and remaining in a city and the negative connotations as it regards the city now—I just thought it would be better for me any my family since I'm head of my household to leave the city.

(T.1/31).

Ms. Hollins was a professional, possessing both a Bachelors and a Masters Degree in Urban Affairs (T.1/31). In December, 1982, she was "Director of Marketing for St. Louis University's Metropolitan College" (T.1/32). Because of the "effect . . . [of] the arrest and the publicity that surrounded it . . . [she] had a problem on [her] . . . job" (T.1/70). Between "October of 1982" when she had "first taken that job" and "December the 8th, 1982," she "receive[d] evaluations and job ratings" of "[s]uperior . . . [i]n every category" (T.1/71-72). Ms. Hollins then described that:

> After the incident I started to have a problem with my boss. Before the incident and before I went to court as a result of the incident, I had superior ratings. There was nothing that I needed for my department that was not granted. I came and went at leisure without reporting. I had complete freedom and I ran my department. After the incident and after I had a conversation with my boss, who was very unhappy about the arrest because I was in public relations — he felt that I represented the University and that it was not a favorable image for me to have in my positiion. My ratings started to decline. In addition to that, I have a written notification that I still have that says that I had to provide an itinerary every week to let him know what I was going to do, where I was going to be and various other things. After that point my job position, I continually had pressure and I had a lot of problems with my boss that I didn't have before then . . . the actual arrest itself . . . interfere[d] with . . . job performance . . . effect[ed]

> . . .attitude. . . I knew I was being harrased on the job. . . it was very humorous to a lot of people, but it was never humorous to me. . . ha[d] occasion to walk out of a meeting because of the embarassment(*sic*).

(T.1/72-73).

Her boss "was concerned about the arrest" (T.1/76). As for the final outcome on her employment, she concluded "I was fired" (T.1/86). "I do know that I had superior ratings before I was arrested. I had a conversation with my boss and after that I never could do anything to please him. It was just down the hill and he would throw Wellston up" (T.1/87). "I suffered a lot in terms of my professional integrity" (T.1/91). Ms. Hollins' immediate superior at St. Louis University, Dr. Cheatham, testified, "she had been arrested. . . I was concerned that that did reflect bad on me and the University. . . her job performance after the arrest declined. . . [a]fter the arrest, progressively worse — her performance. . . her mind was preoccupied. . . she couldn't get things done on schedule. . . had she not taken up . . . offer to resign. . . she would have been terminated" (T.2/27-28).

Ms. Hollins previously had a long standing devotion and commitment to the City. She was a "police officer supervisor" for the City "[i]n 1973," and "[i]n 1978. . . was Executive Secretary to the Mayor for the City of Wellston" (T.1/33-34). She testified about her numerous other efforts in the community:

> Since 1980, but before that I worked on a volunteer basis with them. Although I was not a commissioner, because of my work in planning and my degree I would help the Assistant Executive Director with proposals and grant applications.
>
> . . . .

> I developed and created the first newsletter and I mailed that letter to all voters, all registered voters and citizens of Wellston as well as to two hundred sixty-five black mayors across the United States.
>
> In addition to that, I won some awards for that newsletter. I also took it upon myself, along with the Director of Parks and Recreation, to make up a travelling board and what we did was to go out with camera, take pictures of the development that was going on in the city, take pictures of the kids that were on the boxing team, take pictures of all sorts of good events because Wellston had not had a good image and this was our attempt to make it into something positive, and our logo was "Wellston's on the Way Up." And we had an arrow pointing up and we take this board out to fairs. We did some at River Roads, we did some at Northwest Plaza, we did some at the Normandy Day. We appeared also in Annie Malone's parade. It was all an effort to instill pride in the community and to show that we were trying to do something positive.

(T.1/41-42). "Everybody in the community kn[ew] who [she was]" (T.1/39).

Ms. Hollins "was appointed originally in 1980 as a Housing and Land Clearance Commissioner...[and] became Chairperson of the commission in 1982...[and] by December...had been Chair for some eight or nine months" (T.1/32-33). The job paid "[n]o salary...[or] fringe benefits" (T.1/40).

During the incident on December 8, 1982, she and the other Commissioners were placed "under arrest...[and] read... their rights on the card" (T.1/58). Only the Commissioners (who were all Black) were arrested because "the Mayor had said don't arrest the whites," who were the Executive Director and the attorney for the Authorities (T.1/59, 66). They were transported to the City's Police Department in marked police cars (T.1/59-60), "book[ed]," "assign[ed]...[an] arrest

number," forced to "empty...pockets [and]...purse[s]... remove...jewelry" and held for approximately three and one-half hours" (T.1/62-64). The press came to the City's Police Department and took photographs (T.1/66).

A newspaper article and a picture of all four Commissioners appeared "in the St. Louis Post Dispatch...on Thursday, December the 9th"...[t]he next day" (T.1/66-67). Other articles on the Commissioners' arrests appeared in the St. Louis *Globe Democrat* and the Kansas City *Star* (T.1/68). Ms. Hollins "refused to discuss it with" the press (T.1/69). People sent her "copies of these articles in the mail," and she received "other correspondence about this incidence...[and] a card" (T.1/69).

The incident was aired on the radio on "KMOX" (T.1/69) and on "KATZ" (T.2/89) "maybe five" times (T.2/90)... [e]ven a week after" (T.2/91). The KATZ broadcasts were during "the morning rush hour...a big listening time" (T.2/92). The KATZ audience size for the same broadcast at time of trial one year later was "fifty to seventy-five thousand" (T.2/93). The KATZ broadcaster testified that Ms. Hollins "was on the air about the black Mayor's conference or something and I kind of mentioned it to her and I kind of — she was really — went into like a shock type thing when I mentioned it" (T.2/94).

When Ms. Hollins attended "statewide meetings of Housing Officials and...the National Conferences...[her]...arrest and the arrest of the three others...[were] topics of conversation at those meetings...[v]ery much so" (T.1/70). On occasion, it "cause[d] [her]...not to go [to] the meeting and just stay in... [her] hotel room...[b]ecause it's embarassing (*sic*) that you're serving on something for free and that you have the notoriety behind it" (T.1/70).

She was teased "about the incident in Wellston...[although not] in a jovial nature" (T.1/83). The arrest caused "close friends...[to] make jokes about it," although Ms. Hollins

"never thought that it was funny" and "other people [at work] ...would mention it...in a non-joking manner" (T.1/91).

The "arrest and the publicity that surrounded it" caused other problems (T.1/70). Ms. Hollins "started to vomit and lose weight and...[she] had an increase in...[her] medication because of the problem...prescription medication" (T.1/70-71). "[T]his physical and medical problem persist[ed]" upto the date of trial, 15 months later (T.1/70-71). She later testified as to her damages, "I can never be repaid for my health ...I can't be repaid as a professional, that I was terminated or forced into a termination on a job...I'm still suffering as a result of it" (T.2/237-38).

Commissioner Annette McNeil at the time of trial had lived in the City for 17 years "[s]ince October of 1966" (T.1/97). She holds a "nursing license," and although previously having "worked at Barnes Hospital and Christian Hospital...[she presently] do[es] private duty" nursing (T.1/97). She had been a commissioner of both Authorities only "[s]ince November of 1981," but in "the late '60's...[she] started helping writing proposals for houses for Wellston for low income," for which she received no pay (T.1/97-98). Her commitment to the City also included volunteer positions on the "Wellston School Board" for "[f]our and a half years," the "Gateway Center for three years...[to] help people do various things for the community — help people with food" (T.1/98).

Like Ms. Hollins, Ms. McNeil was transported to the police station under full custodial arrest and required "to empty... [her] purse...had a lot of questions to answer...ha[d] to remove...jewelry" (T.1/106-07). Ms. McNeil had "[n]ever been arrested before" (T.1/107-08). She testified:

> After we was there, the press came and I think I was the first one — I asked them — I told them not to let them in because we didn't want out pictures taken and no one said anything. So, I shut the door back up and then in the next

> thing we knew somebody — I don't know which one or who, someone threw the door open and the press came in and took pictures anyway.

(T.1/108).

Ms. McNeil identified the St. Louis *Post Dispatch* photograph and saw a story about the incident "on television," although she "[n]ever talk[ed] to anyone from the news media, whether the press or the radio or the television about this" (T.1/108). She was aware of the articles in the St. Louis *Globe Democrat* and in the Kansas City *Star,* as well (T.1/114).

The arrest was "the topic of conversation at the Housing Official's meetings...[a]lways since it happened...one very, very bad one in Jefferson City...last year" (T.1/113). "Senator Harriet Woods was addressing the group...Mrs. Wallace and I were the only two blacks there representing at that meeting and when we walked in, we was introduced as the Wellston Jailbirds of the Housing Authority...[I] [f]elt like crying" (T.1/113).

> [I]t was so bad and then the people were talking, you know — they weren't talking direct to you, but they would be talking Wellston this and Wellston that and at one point Miss Wallace said "Ann, since you're feeling so bad, we'll go back to the room and change clothes and rest and maybe you'll feel better later." You know, you didn't feel like facing the people and I felt myself a lot of times, the ones that usually would talk to me, if they'd see me, to me, they would turn and go the other way.

(T.1/114). "[I]t's not funny...[i]t's embarassing (*sic*). It's just not funny at all" (T.1/114-15).

Ms. McNeil suffered "physical reaction to having been arrested on December the 8th, 1982...a nervous stomach...[she had] been off...medicine for quite awhile...[b]efore the arrest ...for over a year" (T.1/109). "I got so sick...I couldn't even go to the doctor's office...a spastic stomach...I wouldn't have

been safe going to the doctor's office...still on the medication ...went back on...[s]tarting with December 8th or 9th of '82" (T.1/109-10). "It's really messing with my blood pressure and causing me to keep my pressure up, which I'm supposed to be in the hospital right now" (T.1/110). In addition, Ms. McNeil suffered from "not being able to sleep and keep things on my stomach — is a great embarassment" (*sic*) (T.1/112). She concluded by observing:

> [T]he source of the embarassment (*sic*)...[w]ell, for one thing, always have a lot of children come over to the house and I associate with a lot of doctors and lawyers I've worked for, and some of them correspond with me now, but since that day, none of them have, or if you see some of them, you know, they have things to say that you don't feel good about.

(T.1/113).

Commissioner Lloyd Brown worked for the Human Development Corporation (T.2/42) and had served as a member of the Authorities "[s]ince October, 1982" (T.2/43). He related his past service to his community of Wellston:

> In the City of Wellston, I was appointed to the first Parks and Recreation Board the City of Wellston had. I was on the Human Development Corporation, Gateway Center Board in the City of Wellston. I've served on the Parent Human Development Corporation board representing the City of Wellston. For five years I was a volunteer youth supervisor for the school district summer youth programs. While I was in VISTA, I worked in the City of Wellston as a volunteer setting up food co-ops, senior citizen programs and I wrote a proposal to fund a youth program. I've done volunteer work in Wellston for about twenty years.

(T.2/45-46). He described his arrest, being transported to the police station (T.2/50), being forced to remove "all...

jewelry," empty his pockets, answer questions and being booked (T.2/52). Mr. Brown testified he had "[n]ever been arrested before (T.2/52). He remembered the press being at the police station and stated he never discussed the incident with the press for a "year and a half" after it occurred (T.2/53, 106). He recalled articles of his arrest in the St. Louis *Post Dispatch*, in the St. Louis *Globe Democrat*, in the Kansas City *Times*, and on television's Channel 2 (T.2/54).

He described in tearful detail the horror of the incident and its effect upon him:

> I felt — I felt ridiculous. I felt terrible. I had — I had only been on the board for two months at that time and to be arrested attending your second meeting, it was a terrible experience. I really didn't know what was going on and it was just humiliating. I have a lot of programs in Wellston that I work with the kids. That's been my biggest thing over the years is working with kids, and it was just so humiliating to be put in a police car right in front of City Hall and the kids that you had worked with all these years, kids that are home from college, the kids that are high school kids that know you, that respect you — to see you being arrested and taken to a police station for trying to do a civic duty — it was just totally humiliating...ha[d] occasion to attend meetings in other parts of the state or in other parts of the country with housing officials from around the nation...arrest [was] the subject of discussion at all the meetings practically all the time...affect[ed]... ability to do...[the] job when...[I] attended these meetings...I got to the point where I just left a meeting, a couple of meetings and went back to my room. I didn't want to discuss it anymore, didn't want to talk about it anymore.

(T.2/56-57). Mr. Brown stated he did not "consider this a big joke...[n]ot at all" (T.2/57). He continued by explaining how he felt he had "been damaged by it":

> Well, as I say, most of my life, or at least the past twenty, twenty-five years, I've been active in community affairs, mostly as a volunteer. I worked in VISTA for two years. I was with the original — one of the original founders of the Matthew-Dickey Boys Club back in the very early '60's when we didn't even have a building. I've served on Youth Center boards, Youth Council boards, Youth Employment boards, Community boards. My family is a well-known family in the City of Wellston. My father was the first elected, black elected official in the history of Wellston. The Community Center in Wellston, the Charles W. Brown Community Center is named after my father. My mom was the first black elected female in the history of Wellston. The whole family has always been civic minded, community minded, and for something like this to happen, it was just totally unfair.

(T.2/57). Too overwhelmed to continue, a recess was taken to enable the witness to recover his composure (T.2/57-58).

> [I]n April of 1983 I was elected to the Wellston Board of Education for a three year term and that at several of the meetings subsequent to my election, some of the parents and kids and even a couple of board members had kind of frowned upon me for the incident that happened back that prior December.

(T.2/97).

Mr. Brown testified that the arrest affected his employment opportunities. "I feel like some of the jobs I...applied for may have been affected...the arrest c[a]me up in a particular job application...the first of the year...1983" (T.2/98). "I was asked about the problems in Wellston and about the incident ...and I indicated that I did get arrested" (T.2/99). "[O]ther occasions...other inquiries...made as to whether or not...arrested...[a]nd on those occasions...indicated that yes, I have been arrested once...this occasion" (T.2/100).

Commissioner Mamie Wallace at trial was a 15 year resident of the City and had served as a Commissioner on the Authorities since "January, 1982...[a] little over two years (T.2/157-58). She had served her community long and hard in other ways, as well. She had been a member of "the school board," "a PTA President" for "[t]en years," worked "for the Gateway Center there, HDC, helping peoples with their homes and problems and to feed their families,...Human Development Corporation...on the Board of HDC...would babysit for them...a foster mother for Wellston" (T.2/159-60). She raised eight foster children (T.2/171), as well as eight natural children of her own (T.2/182).

She was arrested with the other Commissioners, read her rights and "carried...down the stairs" (T.2/167). She was transported to the police department, "separated" from the others and booked (T.2/168). Her jewelry was removed and her purse emptied (T.2/169). Her picture was taken by the press, although she "[d]idn't want...[her] picture in the paper... [d]idn't want people to know...[she'd been] arrested," having "[n]ever been arrested before...[or] since" (T.2/170). Ms. Wallace is "not proud" of the picture that appeared in the paper (T.2/170). She saw the article in the St. Louis *Globe Democrat* and in the Kansas City *Star* and saw the story on television (T.2/170). Her neighbors called to report having seen it (T.2/170). She was highly distressed over her arrest and explained:

> Well, tore me. I didn't feel too good because — I don't know. They say something like you're a pillar of the community in all these years being PTA mother. I had raised a lot of children and not only that, but I was also a foster mother and that kind of makes me feel kind of bad because I have young people coming back to me now that done made doctors and lawyers and they still figure me as their foster mother and I just never have had a record and it

kind of hurts, you know. I just didn't like it. . . .[at] national meetings or state meetings. . .a topic of conversation . . .[y]es. . .because as far as we know we was the only commissioners in the United States that had ever been arrested, and here was when it was brought up. It was kind of made a surprising to a lot of the commissioners because it's a non-paying proposition and, you know, you just help your community and they didn't — some of them had said they didn't want to be commissioners if they had to be arrested because they couldn't afford the lawsuit and the time away from their jobs to have to go to court. . .friends . . .called and they wanted to know what was happening to us because I had never been involved in anything like that before. . .the phone calls. . .kept up for quite awhile and in order to know what was I going to do about it. So, I told them there wasn't very much we could do — we was already arrested then. We didn't know anything else, you know.

(T.2/171-72).

[S]ince now that I find out I got a record, my son and them laugh at me. They call me jailbird. . .Them do because I always get at them about being right and not trying to, you know — not having any kind of record and they have to carry theirs accordingly because we was trying to be good peoples and I tried to raise them that way and so now they say "Mama, you try us not to get in jail and here you is a jailbird". . .I don't feel too good about it, because I worked in the — went to the school district for so long. As a matter of fact, I had five heart attacks in three years working with the school district, but that didn't stop me from working with them, trying to make a better community to give kids —

(T.2/173-74).

> Well, you know, like I say, I work with childrens and everything and so — and then to have a police record or something is really, is so embarassing (*sic*) to me because when I go out or go to church or something, I work in the capacity — peoples look up to, and when somebody brings up a record or something like that and when you work with the delinquent children, you try to make that as an example that, you know, you don't have a police record, that you lived all these years doing what you think is right and you don't have to have records and stuff like that, and, you know, it really hurts me to know that I do have one . . . people still bring it up . . . [e]very once in awhile, especially if we go to meetings.

(T.2/176-77).

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

Civil Action No. 83-1158-C(2)

Margie Hollins,
Mamie Wallace,
Annette McNeil,
Lloyd Brown,
Plaintiffs,

v.

Robert Lee Powell,
The City of Wellston,
Steven Haynes,
Sylvester Ingram,
Defendants.

DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE A NEW TRIAL

Comes now Defendants, Robert Powell and the City of Wellston, Missouri and request pursuant to Rule 50 (b), Federal Rules of Civil Procedure, judgment notwithstanding the jury verdict or in the alternative pursuant to Rule 59, Federal Rules of Civil Procedure a new trial for the reasons stated in their memorandum in support herein as if more fully set out.

Respectfully submitted,

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APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

Civil Action No. 83-1158-C(2)

Margie Hollins,
Mamie Wallace,
Annette McNeil,
Lloyd Brown,
Plaintiffs,

v.

Robert Lee Powell,
The City of Wellston,
Steven Haynes,
Sylvester Ingram,
Defendants.

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE NEW TRIAL

Comes now Defendants, Robert L. Powell and the City of Wellston, Missouri and in support of their motions for judgment notwithstanding the jury verdict or in the alternative for new trial state as follows:

The Defendants allege that a Jnov should be granted or in the alternative a new trial for the following reasons:

1. There was insufficient evidence to find that there had been a violation of 42 U.S.C. 1983 in that;

A) There was insufficient evidence to prove that there had been a deprivation of a plaintiff's constitutional rights; and

B) There was insufficient evidence to establish that the City of Wellston has as its official policies, rules or laws intentionally or knowingly participated in a deprivation of plaintiffs' constitutional rights.

2. There was insufficient evidence for the jury to find that Plaintiffs had received damages in that there was no evidence of actual damages caused by the alleged constitutional deprivation.

3. The damages verdict of $300,000.00 actual damages and $500,000.00 punitive damages is excessive, the result of passion and/or prejudice and error by the jury.

4. The trial court erred in its refusal to instruct the jury to disregard lay witness testimony as to the medical causation of "high blood pressure", "heart conditions" and the cause of increased medication.

5. The trial court erred in its refusal to grant Defendants' motion for a mistrial when evidence was adduced concerning Plaintiffs injunction against Defendants' in view of the fact that Defendants' motion in limine had been granted excluding such evidence.

6. The trial court erred in allowing testimony of Harold Whitfield over objection of Defendants in that such testimony was privileged as matters between Defendants and their attorney Harold Whitfield and no defense of reliance on advice of Whitfield was at issue.

7. There was no evidence to establish that Plaintiffs had paid any rent to Defendants for the month of December, 1982 and thus, Plaintiffs were mere trespassers and as such could be removed from the Wellston City Hall.

8. There was no evidence to establish that Plaintiffs were properly installed as Commissioners pursuant to Chapter 99 of the Revised Statutes of Missouri and for that reason, Defendants had a legal right to remove them from Wellston City Hall.

9. The trial court erred when it failed to instruct, at Defendants' request, Defendants' good faith defense.

10. The trial court abused its discretion by forcing Defendants to trial at a time when Defendants were financially unprepared for trial.

11. The trial court erred in failing to instruct the jury that Defendants' witness Barbara Tort was the defacto City Clerk of the City of Wellston subsequent to Plaintiffs' erroneous accusations that she was not.

12. There was no evidence to establish that any of the Plaintiffs were entitled to punitive damages, thus, the trial court erred in instructing the jury on punitive damages.

Under Section 1983, Plaintiff must prove that the act of depriving him of his rights was intentionally caused by the Defendant or caused by reckless disregard for the constitutional right of the Plaintiff. Simple negligence, at least where alleged constitutional deprivation finds its source solely within the due process clause of the Fourteenth Amendment, is not sufficient to support action under 42 U.S.C. 1983. *Jamison v. McCurrie,* 565 F. 2d 483 (7th Cir. 1977); *Williams v. Anderson* (8th Cir. 1977); *Papow v. Margate,* 476 F. Supp. 1237.

Plaintiffs brought action against the City of Wellston as the employer of the individual officers. However, the doctrine of respondent superior does not lie under 42 U.S.C. 1983. There must be personal involvement of the Defendant in order to become liable under Section 1983. However, liability may lie as to such a defendant if it can be shown that the defendant, approves or encourages as officials policy the constitutional violation. *Turpen v. Mailet* 619 F. 2d 196 (2nd Cir. 1980); *Cotton v. Hutto,* 577 F. 2d 453 (8th Cir. 1978), *Jennings v. Davis,* 476 F. 2d 1271 (8th Cir. 1973); *Monell v. New York City Dept. of Soc. Serv.,* 436 U.S. 658, 98 S. Ct. 2018.

Municipalities cannot be held liable solely because it employs a tortfeasor, that is, a municipality cannot be held liable under Section 1983 on a respondent superior theory. However, there may be liability if official municipal policy supports the constitutional violation. *Monell, supra; Turpen v. Mailet,* 619 F. 2d 196.

There was no evidence offered by the plaintiff that would show that the City of Wellston, through its administration, that being the Mayor and Board of Aldermen, intentionally or knowingly participated in any actions against the plaintiff nor approved or encouraged as its official policy the actions taken by the individual officers.

Respectfully submitted,

BUSSEY AND JORDAN

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Attorneys for Defendants

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

Civil Action No. 83-1158-C(2)

Margie Hollins,
Mamie Wallace,
Annette McNeil,
Lloyd Brown,
Plaintiffs,

v.

Robert Lee Powell,
The City of Wellston,
Steven Haynes,
Sylvester Ingram,
Defendants.

DEFENDANTS' MOTION TO ALTER OR AMEND THE JUDGMENT

Comes now Defendants Robert Powell and the City of Wellston, Missouri and request this court to amend or alter the judgment previously entered on March 28, 1984, pursuant to Rule 59 (e) Fed. R. Civ. P., for the following reasons:

1. The jury verdict in this case is excessive, based on passion and prejudice of the jury and as such is clearly error and an abuse of discretion by the jury. To remedy this error the court should amend the verdict to $1.00 nominal damages only. This is especially proper in view of the fact that no Plaintiffs introduces evidence of actual damages.

2. The City of Wellston request that the judgment against it be reduced to N. L. in accordance with Chapter 71 Section 185 of the Revised Statutes of Missouri. The City of Wellston, Missouri had *no* liability insurance to cover the allegations in Plaintiffs' Complaint. Therefore, the City of Wellston request that the judgment be reduced in accordance with 71.185 R.S. Mo.

Respectfully submitted,

BUSSEY AND JORDAN

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APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-1158 C (5)

Margie Hollins, et al.,
Plaintiffs,

v.

Robert Lee Powell, et al.,
Defendants.

ORDER

(Filed June 1, 1984)

This matter is before the Court on the several post-trial motions filed by defendants Powell, et al. After careful consideration, the Court makes the following rulings:

IT IS HEREBY ORDERED that defendants' motion for a judgment notwithstanding the verdict be and is **DENIED** pursuant to Rule 50, Federal Rules of Civil Procedure. Defendants failed to either renew their motion for a directed verdict or make a new motion for a directed verdict at the close of all the evidence.

IT IS FURTHER ORDERED that defendants' motion for a new trial be and is **DENIED.** There is sufficient evidence to support the jury's verdict and there was no prejudicial error in any ruling of this Court. The Court finds no miscarriage of justice in the verdict rendered by the jury.

IT IS FURTHER ORDERED that defendants' motion to alter or amend the judgment be and is **DENIED.** As there was

sufficient evidence to support the jury's verdict, failure by a municipality to carry liability insurance is not a bar to recovery under §1983.

IT IS FURTHER ORDERED that defendants' motion to stay execution of judgment pending disposition of its post-trial motions be and is **DENIED** as moot.

Dated this 1st day of June, 1984.

/s/ Stephen N. Limbaugh
United States District Judge

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1806EM

Margie P. Hollins, *et al.*,
Appellees,

v.

Robert Lee Powell, *et al.*,
Appellants.

APPELLEES' MOTION FOR REHEARING, OR IN THE ALTERNATIVE FOR HEARING EN BANC, PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE NO. 40 AND EIGHTH CIRCUIT RULES NOS. 15 AND 16

Come now Appellees and pursuant to Federal Rule of Appellate Procedure No. 40 and to Eighth Circuit Rules Nos. 15 and 16 move for a rehearing, or in the alternative for a hearing *en banc*, of that portion of this Honorable Court Panel's opinion filed September 11, 1985, reducing the compensatory damages from $75,000 per Appellee as determined by the jury to $10,000 and reducing the punitive damages from $125,000 per Appellee as determined by the jury to $500.

Appellees believe that the order of remittitur directed by the Panel has exceeded the Appellate Court's jurisdiction and has denied to them a jury trial, as guaranteed by the Seventh Amendment to the United States Constitution. Such denial has occurred: (1) by reason of the Panel's reliance upon matters outside of the record and which are wholly immaterial to the issue of damages; and, (2) by reason of the Panel's application of a standard of remittitur wholly inconsistent with applicable law, thereby substituting its own judgment for that of the jury.

Pursuant to Eighth Circuit Rule No. 16(d), undersigned counsel expresses a belief, based on a reasoned and studied professional judgment, that the Panel's decision is contrary to the following decisions of the United States Court of Appeals for the Eighth Circuit and of the Supreme Court of the United States and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court. *Slatton v. Martin K. Eby Construction Co., Inc.*, 506 F.2d 505 (8th Cir. 1974); *Northern v. McGraw-Edison Company*, 542 F.2d 1336 (8th Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); *Northern Pacific Railroad Company v. Herbert*, 116 U.S. 642 (1886); and *Dimick v. Schiedt*, 293 U.S. 474 (1935).

Pursuant to Eighth Circuit Rule No. 16(d), undersigned counsel expresses a belief, based on a reasoned and studied professional judgment, that this appeal raises the following questions of exceptional importance: (I) Whether the Panel in reducing the damage awards may rely in its opinion on matters neither contained in the record nor relevant to the amount of damages awarded to Appellees? And, (II) whether the Panel, upon determining that damages awarded were grossly excessive, denied to Appellees their Seventh Amendment rights to a jury trial by substituting its own independent judgment for that of the jury, rather than by reducing the awards to the maximum amount the jury could have awarded without being excessive?

I

A clear and fair reading of the Panel's decision reflects a judicial concern for and consideration of the Appellants' financial status. **E.g.**: "[A] black mayor of limited resources," "a black community," "unlikely that the City will recover much of this award from Powell," "he appears to be under severe financial constraints," "a verdict which cannot possibly be satisfied" (Slip Opinion" at 11-12). The Panel's unwarranted deference to the "assumed" economic plight of the Appellants is impermissible and unsubstantiated. There exists in the entire record

not a scintilla of evidence as to the financial condition of either Appellant. Only post-trial news media reports and Appellants' own self-serving statements during appellate oral argument would even suggest such circumstances. Appellees strenuously maintain that Appellants are easily capable of paying the awards determined by the jury. Nevertheless, even assuming the truth of the Panel's assumptions (based solely upon matters outside of the record), such matters were totally inappropriate for the Panel's consideration of compensatory damages.

> As a general rule, it is error to admit evidence of a party's financial condition unless necessary to determine the damages sustained. *Blankenship v. Rowntree,* 219 F.2d 597, 598 (10th Cir. 1955).. . . Additionally, this inadmissible evidence includes that of the *poverty* of a party. 22 Am.Jur.2d *Damages* §319 (1965).

Whiteley v. OKC Corp., 719 F.2d 1051, 1055 (10th Cir. 1983).

The Panel also appeared to question the quantity of the evidence in noting that "[o]nly one plaintiff offered evidence to corroborate her testimony regarding employment difficulties [and] [n]either of the plaintiffs suffering medical difficulties offered medical evidence in support of their claims" ("Slip Opinion" at 10-11). Since it is clear that the Panel deemed there to be sufficient evidence for a verdict and for a damage award in favor of Appellees, it is difficult to appreciate this observation, inasmuch as once the minimum threshhold has been passed, the quantity of evidence is not legally related to the amount of injury incurred or of damages deserved as compensation.

The Panel also relied upon, in part, its observation "that the plaintiffs received an award of attorneys' fees and costs and thus do not need to rely on either damage award to pay for their attorney's services" ("Slip Opinion" at 12). Again, the record is devoid of any understanding or agreement between Appellees and their counsel as to either the amount or source of fees and

costs incurred. Nor is such understanding or agreement a relevant factor in the determination of either compensatory or punitive damages.

> [T]he basic purpose of a §1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights. . .
>
> . . . .
>
> 'The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty'. . . [and] [t]he Court implicitly has recognized the applicability of this principle to actions under §1983. . .

Carey v. Phiphus, 435 U.S. 247, 254-55 (1978). It is 42 U.S.C., §1988 which addresses itself independently to an award of fees to a prevailing §1983 party.

It must be remembered that the jury returned two separate verdicts of liability against Appellants in favor of Appellees for a single compensatory damage award of $75,000 each, under the two separate and independent theories of recovery: (1) violation of 42 U.S.C., §1983; and, (2) violation of the Missouri common law tort of false arrest (T.3-192 and 3-193). The elements of damage are identical under both claims. Missouri has recently judicially abolished the concept of remittitur. *Firestone v. Crown Center Redevelopment Corporation*, 693 S.W.2d 99, 110 (Mo.banc. 1985) (decided June 25, 1985). Therefore, it is highly questionable under *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938) and its progeny whether the proposed remittitur by this Honorable Court can in any manner impact the award under the state theory of false arrest, in light of *Firestone, supra*. The false arrest count was in all regards a pendent state claim, relying upon no federal statute nor citizenship diversity of the parties for its federal court jurisdiction.

II

Initially, Appellees strongly disagree that the compensatory award of $75,000 per person and the punitive award of $125,000 per person are "plain injustice" and "shocking" ("slip Opinion" at 10). Both the jury and the District Court in its careful review on Appellants' motion for new trial, both having heard the evidence firsthand, concluded that the amounts awarded were appropriate. While the Panel's decision is silent on this point, it is manifest that the Panel found clear error on the part of the District Court in not finding the damages grossly excessive. This "Monday morning quarterbacking" of the District Court judge by a Panel which did not even see the game being played is highly suspect. Regardless, it is manifest that the amounts of compensatory and punitive damages assessed by the Panel constitute a total substitution of its judgment for that of both the jury and the District Court.

The Panel characterized its $10,000 compensatory finding per Appellee as "adequate compensation for the injuries . . . suffered" and the $500 punitive finding per Appellee as sufficient to "serve the purpose of punishing" and to "satisfy the deterrent purpose" ("Slip Opinion" at 11-12). These independent findings of appropriate awards of damages have absolutely denied to Appellees their unconditional right to a jury trial under the Seventh Amendment to the United States Constitution, particularly where the Panel has been influenced by matters outside of the record and not before the jury or the District Court.

Appellees suggest that the Panel has without doubt applied the incorrect standard in reducing the damage awards.

> [W]e agree with Gorsalitz's over-all attack that the court committed an error of law in failing to apply *the proper test of excessiveness, which we hold was the maximum which the jury could reasonably find.* We agree with the view expressed in 3 Barron & Holtzoff, Federal Practice & Procedure (Wright ed.) §1305.1, p.376:

> 'There are some differences of opinion as to the standard by which the court should be guided in determining the amount of remittitur. One theory is that an excessive verdict should be reduced to the minimum amount which the jury might have awarded, since award of any greater sum deprives the defendant of his right to a jury trial. Other courts have felt free to reduce the verdict, by remittitur, to that amount which the court itself considers the jury should have allowed. A final theory is that the jury by its excessive verdict intended to award the maximum and defendant cannot complain of any judgment within the permissible limits. *This theory permits reduction only to the highest amount which the jury could properly have awarded. It is the only theory which has any reasonable claim of being consistent with the Seventh Amendment.*' [Footnotes omitted.]
>
> . . . .

In the present case the district court simply substituted its view of a reasonable amount to award the plaintiff for the verdict of the jury. The forceful language of Mr. Justice Sutherland employed in another context in *Dimick v. Schiedt, supra,* would aptly describe the result of an affirmance of the amount of remittitur required by the district court:

> 'To so hold is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury and accept "an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess." '

Gorsalitz v. Olin Mathieson Chemical Corporation, 425 F.2d 1033, 1046-47 (5th Cir. 1970), *cert. denied,* 407 U.S. 921 (1972). (Emphasis supplied). This standard is still the law in the Fifth

Circuit (*Maxey v. Freightliner Corporation,* 722 F.2d 1238, 1242 (5th Cir. 1984) and *Smith v. Shell Oil Company,* 746 F.2d 1087, 1096 (5th Cir. 1985)), as well as in other Circuits. *See: Reinertsen v. George W. Rogers Construction Company,* 519 F.2d 531, 532 (2nd Cir. 1975); *Katch v. Speidel, Division of Textron, Inc.,* 746 F.2d 1136, 1144 (6th Cir. 1984); *Covey Gas & Oil Co. v. Checketts,* 187 F.2d 561, 563 (9th Cir. 1951); *Jackson v. Magnolia Brokerage Company,* 742 F.2d 1305, 1306-07 (11th Cir. 1984). This Honorable Court has also adopted the standard of remittitur as "the maximum limit justifiable under the evidence." *Slatton v. Martin K. Eby Construction Co., Inc.,* 506 F.2d 505, 508-09 (8th Cir. 1974). Similarly, in reducing an award of punitive damages this Honorable Court has previously referred to this standard as "the outer range" permissible. *Northern v. McGraw-Edison Company,* 542 F.2d 1336, 1350 (8th Cir. 1976), *cert. denied,* 429 U.S. 1097 (1977).

Historically, the Supreme Court has adopted this same standard.

> In requiring the remission of what was deemed excessive it did nothing more than require the relinquishment of *so much of the damages as,* in its opinion, *the jury had improperly awarded.* The corrected verdict could therefore, be properly allowed to stand.

Northern Pacific Railroad Company v. Herbert, 116 U.S. 642, 646 (1886). (emphasis supplied).

> [A]ny seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.
>
> . . . .
>
> Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with *the unlawful excess,* — in that sense that it has been found by the jury, — . . .

Dimick v. Schiedt, 293 U.S. 474, 486 (1935). (Emphasis supplied).

The Supreme Court has consistently looked askance at grossly excessive damage award findings by the Appellate Courts and have most frequently reversed remittiturs ordered by the Appellate Courts. *See: Grunenthal v. Long Island Railroad Company,* 393 U.S. 156 (19658); *Neese v. Southern Railway Company,* 350 U.S. 77 (1955); and *Snyder v. United States of America,* 350 U.S. 906 (1955). *Snyder, supra,* was reversed outright without opinion. In both *Grunenthal* and *Neese, supra,* in reversing remittiturs ordered by the Appellate Courts, the Supreme Court refused to address the constitutionality of the Appellate Court's jurisdiction to review the denial by the District Court of a motion for new trial on the ground that the verdict was excessive. *Grunenthal, supra,* 393 U.S. at 312; *Neese, supra,* 350 U.S. at 77.

The Panel's decision is also contrary to and violative of the Supreme Court's recent decision in *Anderson v. City of Bessemer City, North Carolina,* ____ U.S. ____ (1985), 84 L.Ed.2d 518.

> Rule 52 'does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous.'
>
> . . . .
>
> Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring

> too much. As the Court has stated in a different context, the trial on the merits should be 'the "main event" . . . rather than a "tryout on the road." ' . . . For these reasons, review of factual findings under the clearly erroneous standard—with its deference to the trier of fact—is the rule, not the exception.
>
> . . . .
>
> [T]he Fourth Circuit improperly conducted what amounted to a *de novo* weighing of the evidence in the record.
>
> . . . .
>
> When the record is examined in light of the appropriately deferential standard, it is apparent that it contains nothing that mandates a finding that the District Court's conclusion was clearly erroneous.

Anderson, supra, 84 L.Ed.2d at 529-30. The Panel's decision makes no finding nor does the record suggest or support a finding that the District Court's refusal to reduce the damage awards was clearly erroneous.

Appellees have been unable to locate a single case in which the Appellate Court substituted its judgment for that of the jury as to the amount of damages, rather than limiting an award deemed shocking or unjust to the maximum amount the jury could lawfully have awarded. Surely, this Honorable Court exceeded its authority in this regard. Appellees have been unable to locate, as well, any reported decision in which compensatory damages were reduced by as much as eighty-seven percent (87%) and/or punitive damages were reduced by as much as ninety-nine per cent (99%), the degree of reductions here.

Accordingly, Appellees request a rehearing, or in the alternative a hearing *en banc,* restoring the damage verdicts as rendered by the jury and as affirmed by the District Court or

ordering a remittitur with respect to the 42 U.S.C., §1983 liability count *only* to the maximum amount a jury could legally have determined in each instance to be appropriate.

Respectfully submitted,

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APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1806-EM

Margie P. Hollins, et al.,
Appellees,

v.

Robert Lee Powell, et al.,
Appellants.

Appeal from the United States
District Court for the
Eastern District of Missouri

Appellees' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

October 14, 1985